No. 69.

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Filed Feb. 2, 1900.

Supreme Court of the United States.

THE CANADA SUGAR REFINING COMPANY,
Libellant and Petitioner,

AGAINST

THE INSURANCE COMPANY OF NORTH AMERICA.

No. 69.
October Term,
1899.

The annexed motion to amend the decree herein in respect of the allowance of interest, will be submitted to the Supreme Court of the United States on the fifth day of February, 1900, at twelve o'clock noon, or as soon thereafter as counsel can be heard.

New York, January 29, 1900.

WILHELMUS MYNDERSE,
Advocate for Petitioner.

To CLIFFORD A. HAND, Esq.,
Advocate for Respondent.

SUPREME COURT OF THE UNITED STATES.

THE CANADA SUGAR REFINING COMPANY, Libellant and Petitioner, AGAINST THE INSURANCE COMPANY OF NORTH AMERICA.	No. 69. October Term, 1899.

And now comes the Canada Sugar Refining Company, petitioner herein, by its counsel, and moves that the decision or decree made herein by this Court on the 8th day of January, 1900, be modified with such effect as to specially direct the payment of interest to the petitioner upon the amount of the decree of the District Court.

SUPREME COURT OF THE UNITED STATES.

THE CANADA SUGAR REFINING COMPANY, Libellant and Petitioner, AGAINST THE INSURANCE COMPANY OF NORTH AMERICA.	No. 69. October Term, 1899.

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION.

This action was brought by the petitioner to collect $15,000, a specific amount insured upon the profits of a cargo of sugar, together with interest (*Libel, Record, p.* 4).

The action was brought in admiralty and resulted in a decree in the District Court in favor of the petitioner, for the full amount of the insurance, with interest to the date of the decree, and costs (*Decree, Record, p.* 75).

Upon appeal to the United States Circuit Court of Appeals the decree of the District Court was reversed (*Record, p.* 8).

The cause was then heard upon a writ of *certiorari* in this Court, and a decree was made on January 8th, directing that the decree of the District Court be affirmed, with costs.

There was no direction in respect of interest.

The mandate has not yet issued.

This Court has made certain provisions respecting the allowance of interest, in Rule 23.

By paragraph 1 it directs that in all cases of writs of error where the judgment of the inferior court is affirmed, interest shall be calculated and levied at the rate that similar judgments bear interest in the courts of the State where the judgment was rendered.

By paragraph 2 provision is made for damages as well as interest, in cases where a writ of error appears to have been sued out merely for delay.

By paragraph 3 the same rule is applied to decrees, for the payment of money in cases in equity, "unless otherwise ordered by the Court."

Paragraph 4, as recently amended, in 1890, reads;

> "4. In cases in admiralty damages and interest may be allowed if specially directed by the Court."
>
> 133 *U. S.*, *p.* 711 (*Appendix*).

By Rule 38 of this Court the provisions of Rule 23 in regard to interest is made applicable to writs of error, and to appeals and reviews under the provisions in Sections 5 and 6 of the Act of 1891, establishing the Circuit Court of Appeals.

> 139 *U. S.*, *p.* 707 (*Appendix*).

There is a serious question, therefore, whether under the present form of decree of this Court the petitioner would recover interest upon the decree of the District Court.

The reason of the discrimination in respect of interest in admiralty cases is stated by this Court to be that

> "in cases of collision and salvage, and more especially in the latter, it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It must depend mainly upon estimates, and the opinions of persons acquainted with the subject; and, acting upon mere estimates and opinions, different minds unavoidably come to different conclusions as to the amount proper to be allowed.
>
> "And it will sometimes happen in an admiralty case, that this Court will think that the damages estimated and allowed in the Circuit Court are too high, and yet the opinion here may approximate so nearly to that of the court below, that this Court would not feel justified in reversing its judgment. Besides, new testimony may be taken here, in an admiralty case, and a new aspect given to it. No rule, therefore, fixing any certain rate

"of interest upon decrees in admiralty, whenever
"the decree is affirmed, could be adopted with jus-
"tice to the parties."

Hemmenway vs. *Fisher*, 20 *How.*, 255, *p.* 260.

The present case, being purely for a contract amount, seems to be outside of the reasons which originally controlled the Court in reserving its right to allow or disallow interest in admiralty cases.

It is quite akin to the common law cases in which interest is allowed as a matter of course.

The petitioner paid premiums for a specific amount of insurance, and is not receiving the full value of such insurance unless it recovers interest from the date of the decree of the District Court.

The decree of the District Court would have been executed in June, 1897, but for the appeal taken by the respondent. The delay in the enforcement of the decree has been due solely to the appeal taken by the respondent, and upon such decree being restored to efficiency it should be payable with interest.

For the sake of avoiding any question in the District Court we respectfully submit that the decree of this Court should be modified so as to "specially direct" the payment of interest.

WILHELMUS MYNDERSE,
Advocate.

SUPREME COURT.

IN THE MATTER

of

The Petition of THE CANADA SUGAR REFINING COMPANY, LIMITED,

In

U. S. Circuit Court of Appeals for the Second Circuit.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
Libellant,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

Brief on the Part of Respondent.

We cannot undertake to now anticipate the argument of this cause, if it shall please the Court to grant the petition of the libellant. The few days of time allowed us by the libellant are too short for such a purpose. Nor do we understand it to be the intent of the practice to hear the case with reference to anything like a decision of it, or to

commit the Court in this first instance to any theory of or for such a decision. The only point, now under consideration, is whether the questions, passed upon by the Circuit Court of Appeals, were of sufficient gravity and importance to justify the libellant in demanding the exceptional privilege of a review by the Supreme Court.

The essential facts, displayed by the record, are that a cargo of about twenty-four hundred tons of sugar (73,089 mats) was shipped, at Iloilo, by the ship "John E. Sayre," consigned to the libellant at Montreal; that this cargo was insured by the libellant, with Atlantic Mutual Insurance Company (hereinafter designated cargo underwriter) at a valuation of seven dollars and a half to the pound sterling, amounting in American currency to $166,145 (Record, Ex. 9, page 66); that a very considerable profit was included in the sum insured, through the valuation of the pound sterling at more than fifty per cent. above the true value of a pound sterling; that the valuation of the cargo, in the opinion of the District Court and in the arguments of counsel for the libellants, at one hundred and eighty-one thousand dollars, is an erroneous and illusive method of valuation, inasmuch as it is applied to property at sea in the course of a long voyage and includes the hope or expectation of profit on safe arrival; that, in other words, commercial usage and commercial law invariably separate the two interests and distinguish between original value or invoice cost, and this expected profit; that, after obtaining the above-named insurance from the cargo underwriter, the libellant obtained the further insurance on profits, of which a copy is given on pages 3 and 4 of the petition of the libellant; that this last insurance was for "$15,000 on profits on cargo of sugar *against total* "*loss only* valued at sum insured," etc.; that,

sailing from Iloilo on 10th February, '93, the ship, with its cargo on board, was stranded on the coast of Newfoundland, during the first few days of July, 1893, and the master at once, in the exercise of his authority, employed local salvors and got out a portion of the cargo and had it stored in safety on shore (Record, folios 135, 136 and 141); that the ship became a total wreck and the residue of the cargo was lost; that thereupon the cargo underwriter intervened for the purpose of getting the cargo forwarded to Montreal and settled up the expense and salvage accounts and procured transshipment to Montreal of what was saved; that this intervention of the cargo underwriter was in accordance with the sue and labor clause of the cargo policy, making it the duty of the assured and the right of the insurer "to sue, labor and travel for, "in and about the defence, safeguard and recovery "of the said goods and merchandises, or any part "thereof, without prejudice to this insurance" and providing that neither the "acts of insured "or insurers in recovering, saving and pre-"serving the property insured in case of disaster, "be considered a waiver or an acceptance of an "abandonment" and was always in accord with the correspondence between the cargo underwriter and the libellant (Record, Exs. 5 to 8, pages 63 to 65); that having paid the expense account at the scene of wreck, the cargo underwriter caused the bills of lading for the saved sugar by the forwarding vessel to run to itself, but upon arrival at Montreal endorsed these bills of lading and delivered them to the libellant, who received the saved cargo with no expense or charge to themselves, excepting the difference between the proportion of original freight and transshipment freight applicable to this saved cargo, and which original freight would have been payable by the libellant in any event; that there-

upon the cargo underwriter settled its policy with the libellant as their insured; that while in the testimony of Mr. Drummond, an officer of the libellant, an effort was made by counsel to confuse the question in some degree, yet it is clear that the cargo was received by the libellants at Montreal and that the settlement with the cargo underwriter was on the basis of a partial loss; that this is conclusively established by the endorsements upon the cargo policy itself (Record, Ex. 9, p. 66), which are endorsements of partial loss settlement; and that the transaction resulted in the receipt by the libellants, dry and uninjured, of about ninety-two hundred sacks (weighing over 307 tons) of their cargo, as well as about twenty-five tons in a damaged condition and as well also as payment by the cargo underwriter for all the cargo that was lost (See as to particulars of the saved cargo the transshipment bills of lading, Exs. A. W. H., 17, 18 and 19, Record, pages 104 to 108). In short and in so far as concerns this saved cargo, to the extent of three hundred and seven tons, and being about one-eighth of the original shipment, it came to the hands of the libellants as free from loss, injury or charge, as would have been the case if no disaster had occurred. It may be added that there is nowhere in the record any evidence, or indeed claim, that there was ever an abandonment to either cargo underwriter or underwriter on profits.

The insurance, by the respondents, bound them to pay fifteen thousand dollars in case, and *in case only, of total loss of profits.* That there was no such total loss is undeniable, indeed is matter of arithmetic. When a substantial part of the cargo reached the libellants at Montreal sound and uninjured, it carried with it its own proportion of the profits. There is no evidence that this part of the cargo was not, when it reached their hands, of the full

expected value, nor that the libellants did not realize the entire profit anticipated by them upon that part of their cargo, nor is it deniable that if the recovery by them in the District Court had been sustained, they would have in their pockets this profit thus actually realized by them and also the fifteen thousand dollars which included or duplicated such realization. Without precipitating a discussion of the general doctrine of profits and their relation to cargo and the loss of profits as dependent upon loss of cargo, which is understood to have been settled in our courts by the Patapsco case (3d Peters, 222), we have the plain case of actual absence of total loss of profits, and therefore, it would seem, of actual absence of any right to recover under the profit policy obtained from the respondents. Nor can it be useful to suggest that contracts of this kind, carefully limited as to the character of risk, are made by and with merchants competent to care for their own interests and content, with reference to the stipulated premium, to carry on their own shoulders such hazards as are excepted from the insurance.

Inasmuch as the petition quotes at considerable length from the opinion of Judge Brown, in the District Court, and lays much stress upon that opinion, which has seemed and still seems to us to have been in error in all essential particulars, we annex a copy of the opinion of the Circuit Court of Appeals, delivered by Judge Wallace. And we content ourselves with this brief statement of reasons why, in our humble judgment, the record is not one calling for the unusual intervention of this Honorable Court to disturb the finality provided by law for the judgments of the Circuit Court of Appeals. Indeed, such an application for intervention, in any case, involves serious embarrassment to the successful party of entering upon a

premature or preliminary partial argument in support of his judgment, and which cannot but be unsatisfactory to both court and counsel.

Respectfully submitted,

CLIFFORD A. HAND,
Attorney and of Counsel for the
Respondent.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
Appellee,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,
Appellant.

WALLACE, Circuit Judge:

The libel in this cause was filed to recover upon a contract of insurance with the libellant, evidenced by a certificate dated April 29, 1893, delivered by the appellant at Philadelphia, whereby the latter caused to be insured under its open policy No. 117,407 against perils of the sea "15,000 on profits on cargo of sugar against total loss only, valued at sum insured, shipped on board the British ship John E. Sayre at and from Iloilo to Montreal." The policy contains the usual clause making the insurer responsible only for so much as the amount of prior insurance may be deficient toward fully covering the property at risk. The sugar was owned by the libellant, consisted of about 2,460 tons, was of the value of about $181,000, and was insured for $166,145 by the Atlantic Mutual Insurance Company. The insurance of the Atlantic Mutual Insurance Company covered the original cost price of the sugar to the libellant, and an advance in market price since its purchase

by the libellant; and when the insurance with the appellant was effected there had been a still further advance in market price, so that the insurance on profits really covered a profit which had accrued to the libellant when it was effected. The appellant had been informed by the libellant of the insurance upon the cargo. July 6th the ship stranded on the coast of Newfoundland, and ultimately became a total wreck. The master at once made arrangements with local salvors for saving and storing the cargo, agreeing to give them one-half saved. The salvors removed from the ship to their own vessels all the cargo capable of being saved. The master was about to arrange for the transportation to Montreal of the part not going to the salvors when the Atlantic Mutual Insurance Company, which had meantime been informed of the disaster, intervened and took entire control. That company carried out the agreement made by the master with the salvors, paying them an equivalent in lieu of one-half of the sugar saved, and caused the sugar saved to be re-conditioned and shipped to Montreal on the steamer "Tiber" and delivered upon arrival there to the libellant. The expenses incurred by the Atlantic Mutual Insurance Company for reconditioning and forwarding the cargo, and adjusting the claims of the salvors, amounted to $10,167. That company also paid the ocean freight upon the quantity of cargo saved. It adjusted the loss with the libellant by paying the equivalent of the whole amount of its policy less the insured value of the sugar delivered to the libellant. The cargo delivered to the libellant consisted of 307 tons of dry sugar and about 26 tons of wet, and was of the value of about $20,000. There was no notice of abandonment given to the appellant.

Upon these facts the Court below was of the

opinion that there had been a total loss of the profits insured within the meaning of the contract, and decreed accordingly for the full amount of the insurance.

The subject of insurance was not the libellant's cargo of sugars, but the profits, and the total loss to which the liability of the underwriter was restricted by the contract of the parties was a total loss of profits. That there was no actual total loss of profits is entirely clear. Insurance of profits of a cargo is an engagement by the underwriter that the goods shall not be prevented by the perils insured against from arriving at their destination in a condition for earning profits; and in a valued policy the parties fix for the purpose of adjusting a loss the sum which the cargo would earn upon safe arrival by way of profits. Under an insurance of profits a loss of cargo carries with it, of course, the loss of the profits, at least is *prima facie* evidence of their loss; and under a valued policy the assured is entitled to recover the whole insurance upon proof of a total loss of the goods, without proof that any profits would have been made if the goods had arrived. Barclay *vs.* Cousins (2 East., 544); Patapsco Insurance Company *vs.* Coulter (3 Peters, 222); Mumford *vs.* Hallett (1 Johns., 439); Fosdick *vs.* North American Marine Insurance Company, (3 Day, 108); French *vs.* Hope Insurance Company, (16 Pickering, 397). "If a part of the goods only are prevented from arriving it constitutes a partial loss of those interests, according to the construction put upon it in the United States." 2 Phillips on Insurance, Sec. 1503. In other words, there can be no actual total loss of profits when part of the goods arrive in condition to earn a profit (Loomis *vs.* Shaw, 2 Johns Cases, 36) notwithstanding a greater part have been destroyed by the perils insured against. Wain *vs.* Thompson

(9 S. & R., 115). In such a case under a valued policy, the insured can only recover of the underwriter the valuation less the profits to be accounted for. French *vs.* The Hope Insurance Company, *supra*. It is only in a case of total loss that there is any difference between an open and valued policy. Marshal on Insurance, 268, 618. Bateman's Commercial Law, Sec. 1129. In the present case the value of the cargo saved was comparatively insignificant, being only about $10,000, after deducting salvage and expenses, or alternatively something over 150 tons of dry sugar out of 2,460 tons; but part having been saved and actually received by the libellant, there was not an actual total loss. A loss of part of the cargo is a proportional loss on profits.

The question then arises whether the libellant was entitled to recover upon the theory of a constructive total loss. A constructive total loss is one where the loss, though not actually total, is of such a character that the assured is entitled, if he thinks fit, to treat it as total by an abandonment. A constructive total loss of cargo may arise by the loss of the ship under circumstances amounting to the destruction of the contemplated adventure, when no part of the cargo can be forwarded by a substituted ship except at a cost beyond the value of the goods. So also it may arise if the damage to the goods, though repairable, cannot be repaired except at an expense greater than their value when repaired, and is thus impracticable from a business point of view. There is also in the United States a conventional rule, originally adopted because of its convenience and certainty, which authorizes an abandonment of ship or cargo when the damage exceeds a moiety of the value, and a recovery as for a total loss. An abandonment is indispensable in all cases of constructive total

loss, except in those where it could not possibly be of any benefit to the insurer.

By the later authorities it is settled that under a policy insuring a ship or cargo against "total loss only," the assured is entitled to recover upon proof of a constructive total loss. Adams *vs.* MacKenzie (13 C. B., N. S., 422); Heebner *vs.* Eagle Insurance Company (10 Gray, 131); Green *vs.* Pacific Insurance Company (9 Allen, 217); Burt *vs.* Brewers and Malsters Insurance Company (78 N. Y., 400); Carr *vs.* Security Insurance Company (109 N. Y., 504); Snow *vs.* Union Mutual and Marine Insurance Company (119 Mass., 592). It is a reasonable intendment that when an underwriter offers to indemnify the insured against a "total loss," he means to be understood to include any loss which the latter may justifiably treat as total. If he contemplates a more limited liability he can protect himself by insuring against actual or absolute total loss. It does not necessarily follow that these words are to be given the same meaning in a policy upon profits as in a policy upon cargo; and our opinion is that they cannot have the same meaning. How can there be a constructive total loss of profits? In all cases where the destruction of the voyage or the damage to the cargo renders it impracticable, because the outlay will exceed the returns, to go on with the adventure there is an actual total loss of profits, though it may be there is only a constructive total loss of the cargo. The moiety rule cannot apply, because the profits cannot be separated from the goods themselves, and an abandonment is ordinarily so impracticable that the rule cannot be supposed to have entered into the contemplation of the parties when making their contract. It has never been decided that in case of an insurance of profits, an actual partial loss of the profits can be made

total by abandonment, and the commentators incline to the contrary view. Mr. Phillips says: "On the whole it does not seem that the rule of constructive loss of over fifty per cent. of the value is applicable to a policy on profits in favor of the owner of the goods under any circumstances." Phillips on Insurance, 1656. Prof. Parsons, after intimating that an actual partial loss of profits cannot be made constructively total by abandonment, uses this language: "It would seem, therefore, that the fifty per cent. rule would not apply to an insurance on profits unless the insurer (the assured) should waive his right to abandon the goods, and treating the loss of them as partial, abandon the profits separately. In theory this might be possible, but it would be attended with some difficulties, and can hardly be considered as in fact practicable." 2 Parsons on Marine Insurance, 170–171. If there can be no constructive loss of profits the words "against total loss only" in an insurance upon profits can only refer to an actual total loss. They certainly cannot refer to a partial loss. They can have no effect whatever, if, as has happened here, the assured can retain part of the profits and yet recover as though all have been lost.

The present contract, in view of the extrinsic facts, was intended to be in substance a second insurance on the goods themselves, "another way of valuing the goods." Tom *vs.* Smith (3 Caines, 247), to cover the value represented by the advance in market price, and not adequately protected by prior insurance. See Ionides *vs.* Pender, L. R., 9 Q. B., 531–536. Indeed, it is customary at the place where this contract was made to insure profits under the general denomination of "goods." Pritchett *vs.* Insurance Company of North America (3 Yeates, 461). If the cargo itself instead of the profits had been the interest insured,

the libellant would have been indemnified only to the extent that the prior insurance might prove insufficient. Insurance is a contract of indemnity, and cannot extend to cover the loss in excess of the real loss; and even under a valued policy, where there is a prior insurance, the assured cannot recover upon it more than will, with what has been received from the prior insurance, make up his whole loss. Craige *vs.* Murgatroid (4 Yeates, 161); Watson *vs.* Insurance Company of North America (3 Wash., C. C., 1); Stevenson *vs.* Piscataqua Insurance Company (54 Me., 71); Pleasance *vs.* Maryland Insurance Company (8 Cranch, 55). The property at risk was really the cargo, because the profits were merely an excrescence of the goods; and if the contract had not been "against total loss only," the appellant would have been liable only for the deficiency. It cannot be that the insertion of these words were intended to enlarge the extent of the appellant's liability. They were meant to restrict it. They were used in view of the doctrine, expressed by the commentators upon insurance, that there cannot be a constructive total loss of profits. We think the insurance was placed upon the profits instead of upon the cargo directly, and restricted to a total loss only, to save any question as to the liability of the appellant for a partial or constructive total loss; otherwise there would have been no occasion for naming that interest, and the insurance would have been upon the cargo itself.

By the decree of the Court below the libellant has been awarded a recovery, which, if collected, would put into its pocket the profits realized on the cargo saved, in addition to the amount of the respondent's policy. Irrespective of this consideration and because it has received the profits on a part of the cargo, we are of the opinion that there has not

been a total loss of profits within the meaning of the contract.

The decree is reversed, with costs, and with direction to dismiss the libel.

(Endorsed): United States Circuit Court of Appeals, Second Circuit.—The Canada Sugar Refining Company, Ltd., Appellee, *vs.* The Insurance Company of North America, Appellant.—Opinion, Wallace, *C. J.*—United States Circuit Court of Appeals, Second Circuit, filed Apr. 19, 1898, William Parkin, Clerk.

(A copy.)

WM. PARKIN,
Clerk.

[SEAL.]